BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH C. MADER	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,510
THUNDERCORP/DIAMOND TRUCKING	)	
Respondent	)	
AND	)	
	)	
NEW YORK UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from Administrative Law Judge John D. Clark's Award dated February 25, 2000. The Appeals Board heard oral argument on July 14, 2000, in Wichita, Kansas.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. John C. Nodgaard of Wichita, Kansas, appeared on behalf of the Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. Additionally, on March 1, 2000, an agreed order of dismissal of the Fund was filed in this matter. The respondent agreed to dismiss the Fund from this case in exchange for the Fund's agreement to pay respondent the sum of $2,000. Also, after oral argument before the Appeals Board, the respondent and claimant agreed, in a written stipulation dated July 31, 2000, and filed on August 7, 2000, that claimant's preinjury average gross weekly wage was $302.24.

ISSUES

The ALJ found claimant suffered a work-related accidental injury on October 7, 1997, while working for Mr. Mike Thompson d/b/a Diamond Trucking. The parties stipulated that on the date of the accident claimant was an employee of Mr. Thompson and Mr. Thompson was a subcontractor working for the principal contractor, ThunderCorp (herein after referred to as "respondent"). Also, the parties stipulated that, on the date of accident, Mr. Thompson was an uninsured subcontractor and, therefore, respondent, as the principal insured contractor, was liable for payment of workers compensation benefits found due the claimant as if claimant had been immediately employed by respondent.[1]

Claimant appeals the ALJ's 4 percent permanent partial general disability award. Claimant contends he was terminated by Mr. Thompson because of his work-related injuries. Thus, claimant argues he is entitled to a higher permanent partial general disability based on a work disability.

In contrast, respondent, in its brief, contends claimant failed to prove his injuries and resulting disability arose out of and in the course of claimant's employment with Mr. Thompson. Also, respondent argues claimant failed to provide Mr. Thompson with timely notice of the alleged accident. Furthermore, if the Appeals Board does find claimant's injuries compensable, then the respondent argues the ALJ's Award should be affirmed because claimant was terminated for cause not related to his work-related injuries.

Included in the record, as listed in the ALJ's Award, is the December 20, 1999, deposition of Mr. Mike Wolfe, taken on behalf of the claimant. Respondent objects to Mr. Wolfe's deposition being included as part of the record of these proceedings because claimant failed to provide respondent's attorney with proper notice of the deposition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and the parties' arguments, the Appeals Board makes the following findings and conclusions:

Findings of Fact

1. On the date of claimant's alleged accident, October 7, 1997, claimant was employed by Mike Thompson d/b/a Diamond Trucking as an over-the-road truck driver.

2. On the date of the accident, Mr. Thompson was also the operations manager of respondent.

---

[1] *See* K.S.A. 1997 Supp. 44-503.

3. Respondent is a trucking company that principally is in the business of transporting mobile homes under contract for mobile home manufacturing companies and dealers.

4. In the late summer or fall of 1997, respondent made the decision to change its operation from owning its own tractors and hiring truck drivers to contracting with owners/operators to complete its mobile home hauling contracts.

At that time, Mr. Thompson purchased a tractor from respondent and started contracting with respondent to transport mobile homes under contract.

5. Mr. Thompson then employed claimant as a truck driver. Claimant had previously been employed by respondent and had worked directly under Mr. Thompson's supervision.

6. Claimant started working for Mr. Thompson on or about September 11, 1997. Claimant performed some maintenance work on the tractor that Mr. Thompson had purchased from respondent for the first few days of his employment. Claimant then made at least four trips from Wichita, Kansas, to factories or dealers located in Texas and Oklahoma to pick up mobile homes. Claimant delivered the mobile homes to Wichita, Kansas, between September 15, 1997, and October 7, 1997.

7. On September 15, 1997, claimant left Wichita, Kansas, and picked up a mobile home in Waco, Texas. Claimant was originally scheduled to leave Wichita, Kansas, on September 14, 1997, but broke a large hydraulic mirror off the tractor while he was backing the tractor up. The mirror had to be repaired and claimant was not able to leave until the next day, September 15, 1997. Claimant returned with the mobile home to Wichita, Kansas, on September 17, 1997, and delivered the mobile home to the dealer.

8. On October 1, 1997, claimant left Wichita, Kansas, and picked up a mobile home in Gainesville, Texas. On the return trip, claimant lost three wheels off of the axles that were used to transport the mobile home. This caused damage to the mobile home and also burnt out the tractor's clutch.

9. On October 4, 1997, claimant picked up one-half of a double-wide mobile home in Oklahoma City, Oklahoma, and delivered the home to Wichita, Kansas. This trip was completed without incident.

10. Then on October 6, 1997, claimant picked up the other half of the double-wide mobile home in Oklahoma City. But because of a late start, claimant was unable to complete the trip to Wichita, Kansas. Because of regulations of not driving a wide load at night, claimant had to leave the mobile home at the Kansas Port of Entry located on the Kansas and Oklahoma border.

11. Claimant returned and picked up the other half of the double-wide mobile home on the morning of October 7, 1997. He was met there by Ms. Joanne Whatley who was contracted to escort the wide load claimant was delivering to Wichita, Kansas.

12. Claimant drove the mobile home to the mobile home dealer located in Wichita, Kansas. But when he arrived, the dealer directed him to the dealer's storage lot located east on Highway 54 near Andover, Kansas.

13. Claimant was not familiar with the storage lot location and turned at the wrong side road off Highway 54 on the way to the storage lot. The road that claimant turned onto ended in a T-intersection and claimant was unable to turn the mobile home around. Claimant, therefore, had to back the mobile home across Highway 54 in order to turn the mobile home back east toward the storage lot.

14. The escort had to stop traffic in the east-bound lanes of Highway 54 for claimant to back the mobile home across those lanes. As claimant attempted to back the mobile home out, he radioed Mr. Thompson and notified him of the trouble he was having in delivering the mobile home to the storage lot.

15. On the driver's side of the tractor and mobile home there was a deep ditch and claimant was dangerously close to slipping into the ditch. As claimant was backing out of the road, he stopped to see where the escort had the traffic stopped. Claimant also had a load of axles and blocks on the back of the tractor. Because he was so close to the ditch, he climbed up on the storage area of the tractor and moved an axle in order to shift the load from the driver's side to the passenger side. At that time, his feet slipped out from under him on the wet storage area and he fell off of the tractor to the road surface and the muddy ditch.

16. At first he was disgusted because of the fall and did not immediately notice any pain or discomfort. But later he felt pain, stiffness, and discomfort in his left shoulder and lower back. He also got mud all over his shirt and he removed his muddy shirt before he again started to back the mobile home out of the side road.

17. Finally, claimant was able to back the mobile home across Highway 54 and turn the mobile home back east towards the storage lot. But as he was backing up the mobile home, he knocked down a stop sign on the corner and caused some damage to both the tractor and the mobile home.

18. After claimant delivered the mobile home to the storage lot, he unhooked the mobile home from the tractor. Mr. Thompson arrived at the storage lot shortly after claimant delivered the mobile home. Claimant testified he told Mr. Thompson, at that time, he had fallen from the tractor and he needed medical treatment.

19. Mr. Thompson did not refer claimant for medical treatment. Mr. Thompson instructed claimant to take the tractor to the repair shop and then to go home. Claimant believed that Mr. Thompson would then contact him and refer him for medical treatment. But Mr. Thompson did not contact claimant. Further, after October 7, 1997, claimant attempted on numerous occasions to contact Mr. Thompson by telephone but Mr. Thompson did not return his calls.

20. Finally, on October 17, 1997, Mr. Thompson went over to see claimant as claimant was moving into a new mobile home. Also present, at that time, were two of claimant's acquaintances—Mr. Russell C. Bousquet and Mr. Wolfe—who were helping claimant move furniture. Claimant testified he and Mr. Thompson had a meeting in the mobile home with his two acquaintances present in regard to Mr. Thompson furnishing claimant medical treatment for his injuries and also back pay owed claimant. Mr. Thompson came over to claimant's mobile home to get the tools and the stereo claimant had taken out of the truck so the items would not be stolen.

21. Claimant testified Mr. Thompson agreed to pay him around $4,000 in back wages and provide claimant with medical treatment during this meeting. Additionally, claimant testified Mr. Thompson notified claimant that he was terminating claimant because claimant was injured and could not drive the truck.

22. Both Mr. Bousquet and Mr. Wolfe testified by deposition in this case. Both verified they were present at the time claimant met with Mr. Thompson on October 17, 1997. Both verified that claimant and Mr. Thompson discussed payment of back wages and furnishing medical treatment for claimant's injuries.

23. Mr. Bousquet also testified he saw claimant when he returned from work on October 7, 1997. Mr. Bousquet testified that claimant had a large bruise on his lower back and scratches on his shoulders and rib cage. Claimant was also having problems with movement because of his injuries. Mr. Bousquet testified claimant told him that he had received the injuries in an accident on the job.

24. Ms. Whatley, the woman who drove the escort car for claimant on October 7, 1997, testified by deposition in this case. She testified she did not see claimant get out of his tractor when he was backing the mobile home out of the side road onto Highway 54. Ms. Whatley also testified she could not see if claimant had gotten out of the tractor because where she was located she could not see the driver's side of the tractor. But she also testified she did not think claimant had time to get out of and back into the tractor when he was backing the mobile home out from the side road.

25. Mr. Thompson also testified in this case by deposition on two occasions. He testified he fired claimant on October 7, 1997, at the storage lot because this was the third time in four trips that claimant had damaged the tractor and mobile home since he had employed claimant. In addition, at that time he requested claimant to take a urine test for drugs and

claimant refused. Mr. Thompson denied that he terminated claimant because of his injuries.

In fact, Mr. Thompson testified he did not have any knowledge that claimant was making a claim for injures received from a fall at work on October 7, 1997, until he received a certified letter from claimant on January 18, 1998.

26. Mr. Thompson acknowledged he had met with claimant in order to obtain the stereo and tools from the truck. Mr. Thompson, however, testified he met with claimant on October 15, 1997, instead of October 17, 1997, and did not meet with claimant inside claimant's mobile home. Mr. Thompson also denied that claimant notified him that he needed medical treatment for his injuries. Further, Mr. Thompson denied there were any other people present at the meeting other than his brother, Buck Thompson.

27. Claimant was questioned about Mr. Thompson firing him because he damaged the tractor and mobile homes on three of the four trips he took while employed by Mr. Thompson. Claimant was also questioned as to whether or not Mr. Thompson requested he take a drug test on October 7, 1997, that he refused.

Claimant denied he was fired by Mr. Thompson because he damaged the tractor and mobile homes and also denied that Mr. Thompson requested him to take a drug test.

28. Because Mr. Thompson failed to provide claimant with medical treatment for his injuries, claimant filed an Application for Hearing and an Application for Preliminary Hearing before the Division of Workers Compensation. Claimant named both his employer (Mike Thompson d/b/a Diamond Trucking) and ThunderCorp (the principal contractor) as respondents.

29. After a preliminary hearing was held, respondent ThunderCorp and the claimant entered into an agreed order dated March 11, 1998, that granted claimant his preliminary hearing benefit requests of temporary total disability benefits from claimant's date of accident of October 7, 1997, until released to gainful employment, reimbursement of medical expenses in the amount of $137, and medical treatment to be provided through Wesley Medical Center Occupational Health Services of Wichita, Kansas. In support of claimant's request for preliminary hearing benefits, claimant admitted into the preliminary hearing record medical records from two separate physicians indicating that claimant had a left inguinal hernia. One of the medical reports was from Robert McCown, M.D., which attributed claimant's hernia to his October 7, 1997, accident.

30. Claimant was first seen at Wesley Medical Center Occupational Health Services on March 23, 1998, by Frederick R. Smith, D.O. Dr. Smith found claimant with pain complaints of the neck, left shoulder, left arm, and low back, and discomfort with a left inguinal hernia. Dr. Smith took a history from claimant, reviewed claimant's previous medical treatment records, and completed a physical examination of claimant. His initial assessment was

regional neck, left shoulder, and low back pain with no radiculopathy. Additionally, claimant reported that he had a previous finding of an inguinal hernia. Dr. Smith then referred claimant to a general surgeon to repair the hernia. Claimant was taken off work, placed in a physical therapy program, given osteopathic manual therapy, and prescribed medication.

From March 23, 1998, through October 2, 1998, Dr. Smith saw claimant on eight separate occasions. Because claimant had his left inguinal hernia repaired, claimant did not commence the prescribed physical therapy program until May 1998.

During the period that Dr. Smith treated claimant, he had claimant undergo a number of diagnostic examinations that consisted of regular x-rays, MRI, EMG, and nerve conductive studies. The MRI and x-ray examination of claimant's lumbar spine found a bilateral pars defect at L5-S1, Grade 0 to 1 spondylolisthesis at L5 on S1, desiccation of the disc at L5-S1 with a small radial tear, and a small left paracentral protrusion. Claimant's left shoulder MRI examination was negative, except for a tiny amount of fluid adjacent to the rotator cuff. The MRI examination of the cervical spine indicated bilateral spurring at C5-6 with mild encroachment on the neural foramens bilaterally. The EMG and the nerve conductive studies were negative.

Dr. Smith also had claimant undergo a functional capacity evaluation (FCE) on August 11, 1998. But the FCE was not valid in most areas because of claimant's complaints of pain and his decreased effort. Four out of the five Waddell's signs were positive for symptom magnification.

On October 2, 1998, Dr. Smith determined claimant had met maximum medical improvement and released claimant from his care and treatment. Based on the AMA *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, Dr. Smith assessed claimant with a 5 percent permanent partial functional impairment as a result of claimant's low back injury. Dr. Smith did not find claimant had any ratable permanent functional impairment according to the AMA *Guides* for his left shoulder and cervical complaints. Dr. Smith opined that the left shoulder had a normal range of motion and, although he had some subjective complaints, there were no good objective findings. Dr. Smith also did not find claimant's cervical injury ratable under the AMA *Guides* because claimant still had good range of motion and there was no obvious guarding or restrictions plus the normal EMG test.

Dr. Smith imposed permanent restrictions on claimant's activities of occasional lifting and carrying limited to 40 pounds, occasional pushing and pulling limited to 80 pounds, and repetitive lifting and stooping limited to a maximum of 20 times per hour. Dr. Smith attributed claimant's permanent functional impairment rating of 5 percent and claimant's permanent restrictions all to the muscular strain and sprain of the lumbar spine. The lumbar spine injury was the result of claimant's October 7, 1997, accident while claimant was employed by Mr. Thompson. Additionally, Dr. Smith opined the 5 percent permanent

functional impairment rating did not include any impairment as the result of claimant's preexisting spondylolisthesis condition.

31. Dr. Smith was requested to review a list of job tasks that vocational expert Mr. Jerry D. Hardin had prepared after he interviewed the claimant. Those job tasks represented a fifteen-year history of jobs claimant performed preceding his October 7, 1997, accident. Based on Dr. Smith's permanent restrictions, he agreed with Mr. Hardin's assessment that claimant had a 50 percent job task loss as a result of his October 7, 1997, work accident.

32. After Dr. Smith released claimant to return to work with permanent restrictions, claimant started actively looking for appropriate employment. Admitted into the record is a list of approximately 85 employers claimant testified he had contacted in reference to employment between November 21, 1998, and May 21, 1999. Claimant testified he started working part-time for his brother at Miracle Vinyl in the latter part of May 1999. Claimant earned $6 per hour and worked approximately 20 to 25 hours per week while employed by Miracle Vinyl. Claimant also testified that he continued to contact other employers looking for full-time employment while he was working part-time.

The last time claimant testified in this case was on December 20, 1999. On that date, claimant testified he was working for Checkers Grocery Store as a cashier working approximately 25 to 35 hours per week at $5.65 per hour with no fringe benefits. Claimant started working for Checkers on September 5, 1999.

33. At respondent attorney's request, on April 8, 1999, claimant was examined and evaluated by physical medicine and rehabilitation physician Philip R. Mills, M.D. After taking a history from claimant, reviewing claimant's previous medical treatment records, and conducting a physical examination of claimant, Dr. Mills diagnosed claimant with low back pain and preexisting spondylolisthesis, neck pain with preexisting degenerative arthritis, left shoulder pain with shoulder tendinitis and possible subacromial bursitis, and depression. Dr. Mills attributed claimant's current complaints to his October 7, 1997, work injury.

Based on the AMA *Guides*, Fourth Edition, Dr. Mills assessed claimant with a 3 percent permanent functional impairment of the cervical spine but attributed all of the 3 percent as preexisting impairment. He further found claimant had a 5 percent permanent functional impairment to the lumbosacral spine with a 2 percent impairment preexisting. He rated claimant's left shoulder injury as a 2 percent left upper extremity permanent impairment and converted that rating to a 1 percent whole body rating. He attributed the left shoulder impairment rating to the October 7, 1997, fall. Utilizing the Combined Values Chart of the AMA *Guides*, Dr. Mills opined claimant had a 6 percent permanent partial functional impairment to the body as a whole as a direct and probable consequence of the October 7, 1997, fall at work.

Dr. Mills placed permanent restrictions on claimant's activities to avoid cervical hyperextension, avoid lifting greater than 30 pounds, avoid forward flexion, lift with good body mechanics, and avoid work at or above reach. The doctor opined the cervical and low back restrictions all preexisted claimant's October 7, 1997, fall. But Dr. Mills attributed the left shoulder restriction to the work-related fall.

Based on the left shoulder restriction only, Dr. Mills reviewed a job task list prepared by vocational expert Ms. Karen C. Terrill after interviewing the claimant. The list of job tasks was for jobs claimant had performed in the fifteen year period preceding claimant's October 7, 1997, accident. Dr. Mills found claimant could no longer perform 25 of the 49 tasks listed for a 51 percent job task loss.

34. Claimant's attorney had claimant examined and evaluated on November 5, 1998, by physiatrist Pedro A. Murati, M.D. Dr. Murati also had the benefit of claimant's past medical treatment records to review. After taking a history from claimant and conducting a physical examination of claimant, Dr. Murati's impression was left rotator cuff tear and cervical and lumbar strain with probable radiculopathy.

Dr. Murati, in accordance with the AMA *Guides*, Fourth Edition, assessed claimant with a 4 percent permanent functional impairment of the left shoulder, a 15 percent permanent functional impairment of the cervical spine, and an 8 percent permanent partial impairment of the lumbar spine. He then combined those whole body impairments for a 24 percent permanent functional whole body impairment as a result of the October 7, 1997, accident.

Dr. Murati imposed permanent restrictions on claimant's activities of (1) frequently sit/stand/walk; (2) occasionally bend, climb stairs/ladders, squat, crawl, and drive; (3) occasional above-shoulder level work with the left upper extremity; (4) no work beyond 24 inches away from the body; (5) avoid awkward positions of the neck; and (6) lift/carry/push/pull limited to no more than 35 pounds occasionally, 20 pounds frequently, and 10 pounds constantly.

Dr. Murati was given claimant's job task list prepared by Mr. Hardin to review. After the review, Dr. Murati opined that he agreed with Mr. Hardin's job task loss opinion based on the restrictions Dr. Murati imposed in the amount of 54 percent.

Conclusions of Law

1. In proceedings under the Workers Compensation Act, the claimant has the burden to prove by the preponderance of the credible evidence his/her entitlement to an award of compensation and to prove the various conditions on which that right depends.[2]

---

[2] *See* K.S.A. 1997 Supp. 44-501(a) and K.S.A. 1997 Supp. 44-508(g).

2. K.S.A. 1997 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 1997 Supp. 44-510(e) also specifies that a claimant is not entitled to permanent partial general disability compensation in excess of functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

4. The wage component of the work disability test is based on the actual wage loss only if claimant has shown good faith and efforts at obtaining or retaining employment after injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[3]

5. Even if no work is offered, claimant must show that he/she made a good faith effort to find appropriate employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.[4]

6. Under certain circumstances, an injured worker whom respondent terminates for reasons unrelated to the work injury is limited to an award based on his functional impairment rating.[5]

7. The ALJ found claimant proved he suffered work-related injuries when he fell from the tractor while working for Mr. Thompson on October 7, 1997. The Appeals Board agrees and finds this conclusion is supported by claimant's consistent testimony in regard to the description of how he was injured and claimant's consistent description of the accident he related to the examining and treating physicians. Also, the Appeals Board finds claimant's testimony that he was injured in a fall at work on October 7, 1997, is supported by two

---

[3] *See Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *See Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *See Ramirez v. Excel Corporation*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* ___ *Kan.* ___ *(1999).*

other witnesses who were present at the time Mr. Thompson and claimant discussed payment of back wages and claimant's request for medical treatment.

8. The Appeals Board acknowledges that Ms. Whatley, claimant's escort driver on the day of the accident, was at the location when the alleged fall occurred. Ms. Whatley testified she did not see the claimant fall and did not think the claimant had time to exit his truck during the time he was backing the tractor out of the side road. But the Appeals Board also finds it was possible that Ms. Whatley did not see claimant fall because, as she testified, she could not see the driver's side of the tractor from her location on Highway 54. Also, her attention was primarily directed to the traffic on Highway 54.

9. The Appeals Board also agrees and affirms the ALJ's conclusion that claimant provided Mr. Thompson with timely notice of the work-related accident. Even if Mr. Thompson is believed that claimant did not notify him of the fall and resulting injuries on October 7, 1997, as found above, claimant requested medical treatment for his injuries at the meeting he had with Mr. Thompson on October 17, 1997. That meeting occurred within ten days of claimant's fall, which satisfies the statutory notice requirement. [6]

10. The Appeals Board is mindful the record contains some evidence that questions both the claimant's and Mr. Thompson's credibility and truthfulness. But the Appeals Board concludes if claimant's version of the facts are believed, as the facts relate to the October 7, 1997, fall and notice of the fall provided to Mr. Thompson, then claimant's testimony he was terminated not because of the damage to the tractor and mobile homes but because of his work-related injuries also should be believed.

11. In addition, another witness, claimant's former roommate, testified and described with specificity the injuries claimant had when he returned home from work on October 7, 1997. Also, the Appeals Board finds significant in assessing Mr. Thompson's credibility that, although he allegedly thought claimant was under the influence of drugs on October 7, 1997, Mr. Thompson still allowed claimant, after being terminated, to drive the tractor to the repair shop.

12. Thus, the Appeals Board concludes that Mr. Thompson terminated claimant because of his work-related injuries and claimant is entitled to permanent partial general disability benefits based on a work disability, if the work disability percentage is higher than his functional impairment.

13. The parties stipulated that between claimant's October 7, 1997, accident date and October 2, 1998, the date Dr. Smith released claimant from his care and treatment, respondent paid claimant 52 weeks of temporary total disability benefits. After Dr. Smith released claimant with permanent restrictions to return to work on October 2, 1998,

---

[6] *See* K.S.A. 44-520.

claimant testified he commenced actively seeking employment. Admitted into the evidence was a list of some 85 employers claimant contacted from November 21, 1998, through May 21, 1999, requesting employment. This evidence was not contradicted by the respondent.

14. Claimant then started working for his brother at Miracle Vinyl in Wichita, Kansas, in the latter part of May 1999. Claimant was working part-time between 20 to 25 hours per week earning $6 per hour. On September 5, 1999, claimant started working as a cashier at Checkers Grocery Store working 25 to 35 hours per week earning $5.65 per hour. But claimant testified, although he was working part-time, he continued to contact prospective employers on a regular basis in an attempt to find full-time employment.

Based on this uncontradicted evidence, the Appeals Board finds claimant has established that after he was released for work with permanent restrictions he made a good faith effort to find appropriate full-time employment.

15. Therefore, the Appeals Board finds after claimant's October 7, 1997, work accident, claimant was temporarily totally disabled for 52 weeks, then claimant had a 100 percent wage loss until he started working part-time on May 24, 1999, at Miracle Vinyl earning $135 per week for a 55 percent wage loss. On September 5, 1999, claimant started work for Checkers Grocery Store earning $169.50 per week for a 44 percent wage loss.

16. Three physicians testified in this case and expressed their medical opinions on claimant's permanent functional impairment, permanent restrictions, and work task loss. Dr. Mills was employed by the respondent and Dr. Murati was employed by the claimant to examine and evaluate claimant's injuries. Dr. Smith, on the other hand, was claimant's treating physician for over a six-month period in 1998.

The Appeals Board finds Dr. Smith, as claimant's treating physician, was more familiar with the nature and extent of claimant's injuries than Dr. Mills or Dr. Murati who saw claimant on only one occasion. Additionally, the Appeals Board finds that Dr. Smith's medical opinions were formulated and expressed based on good medical reasoning and with a clear objective point of view without bias toward either the claimant or respondent.

Therefore, the Appeals Board concludes, based on Dr. Smith's medical opinions and as a direct result of claimant's October 7, 1997, work accident, claimant sustained a 5 percent permanent functional whole body impairment and based on the permanent restrictions imposed, claimant has a 50 percent work task loss.

The Appeals Board is mindful there was evidence contained in the record that claimant had preexisting injuries to his low back and also had a preexisting spondylolisthesis condition at L5-S1. But Dr. Smith explained, during his testimony, that the 5 percent functional impairment he assessed was for a low back muscular strain related only to claimant's October 7, 1997, work accident and his impairment opinion did

not include claimant's prior low back injuries or his preexisting spondylolisthesis condition at L5-S1.

17. The Appeals Board, therefore, finds claimant is entitled to a 75 percent work disability by averaging the 100 percent wage loss with the 50 percent work task loss for the period from October 7, 1998, through May 23, 1999, then claimant is entitled to a 52.5 percent work disability by averaging a 55 percent wage loss with a 50 percent work task loss, and thereafter claimant is entitled to a 47 percent work disability by averaging a 44 percent wage loss with a 50 percent work task loss.

18. Respondent requests the Appeals Board to exclude Mr. Wolfe's deposition testimony from the record because claimant failed to give respondent proper notice of the deposition. The Appeals Board acknowledges that respondent timely objected to Mr. Wolfe's deposition testimony on the basis of notice. But the Appeals Board also finds respondent's attorney was present at Mr. Wolfe's deposition and had ample opportunity to cross examine Mr. Wolfe. Therefore, the Appeals Board concludes the respondent was not prejudiced in any way because it did not receive a formal notice before the taking of Mr. Wolfe's deposition. The Appeals Board finds Mr. Wolfe's deposition testimony should be included in the record of this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's Award of February 25, 2000, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joseph C. Mader, and against the respondent, ThunderCorp, and its insurance carrier, New York Underwriters Insurance Company, for an accidental injury which occurred October 7, 1997, and based upon an average weekly wage of $302.24.

Claimant is entitled to 52 weeks of temporary total disability compensation at the rate of $201.50 per week or $10,478, followed by 32.71 weeks at the rate of $201.50 per week or $6,591.07 for a 75% permanent partial disability for the period October 7, 1998, through May 23, 1999, followed by 14.86 weeks at the rate of $201.50 per week or $2,994.29 for a 52.5% permanent partial disability for the period May 24, 1999 through September 4, 1999, followed by 130.09 weeks at the rate of $201.50 per week or $26,213.14 for a 47% permanent partial disability beginning September 5, 1999, making a total award of $46,276.50.

As of December 27, 2000, there is due and owing claimant 52 weeks of temporary total disability compensation at the rate of $201.50 per week or $10,478, followed by

116.14 weeks of permanent partial disability compensation at the rate of $201.50 per week in the sum of $23,402.21, for a total of $33,880.21, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $12,396.29 is to be paid for 61.52 weeks at the rate of $201.50 per week, until fully paid or further order of the Director.

All authorized medical expenses are ordered paid by the respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Richard J. Liby, Wichita, KS
John C. Nodgaard, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director